

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HON. LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT COURT JUDGE

AND

HON. JUDGE PEPE
UNITED STATES MAGISTRATE JUDGE

FILED
2005 MAR 28 P 1:14
CLERK OF COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD A. MCBRAYER,

Petitioner,

Case No. ES-04-CV-73235-DT

VS.

HUGH WOLFENBARGER,

Respondent. /

SUPPLEMENTAL AUTHORITY AND ARGUMENT

NOW COMES the petitioner, RICHARD A. MCBRAYER, acting In Pro Per, and hereby incorporates the following supplemental authority and argument in further Reply to Respondent's Motion for Summary Judgment:

1. In his Motion for Summary Judgment, the respondent advances the following two arguments: (1) That the decision in Blakely v. United States, 542 U.S.____; 124 S Ct 2531 (2004), only applies to increases in the maximum sentence; and, (2) that it is unlikely that the constitutional requirements in Blakely will be applied retroactively to cases on collateral review. See Gov. Resp., at p., 5-9.

2. Contrary to respondent's first position, in Booker v. United

States, ____U.S.____; 124 S Ct 738; 76 CrL 265, 270 (2005), the United States Supreme Court explicitly rejected the Government's argument that Blakely only applies to increases in the maximum sentence. 76 CrL at 270.

3. Therefore, the respondent's assertion that the Michigan Supreme Court decision in People v. Claypool, 470 Mich 715, 730 n 14 (2004), is not contrary to, or an unreasonable application of Blakely is untenable.

4. Also contrary to respondent's position is that in the each of the following cases, the Supreme Court applied Blakely's constitutional requirements on collateral review: United States v. Turnbull, 349 F.3d 558 (8th Cir. 2003), cert granted, judgment vacated, and case remanded, ____U.S.____ (SC No. 03-10760, Jan 24, 2005); 2005 WL 123974; United States v. Martinez-Figueroa, 363 F.3d 679 (8th Cir. 2004), cert granted, judgment vacated, and case remanded ____U.S.____ (SC No. 04-5113, Jan 24, 2005); 2005 WL 124171; United States v. Welch, 368 F.3d 970 (7th Cir. 2004), cert granted, judgment vacated, and case remanded, ____U.S.____ (SC No. 04-7045, Jan 24, 2005); 2005 WL 126568; United States v. Banner, 356 F.3d 478 (2nd Cir. 2004), cert granted, judgment vacated, and case remanded, ____U.S.____ (SC No. 04-5130, Jan 24, 2005); 2005 WL 124173; United States v. Meza, 82 Fed Appx. 122 (5th Cir. 2003), cert granted, judgment vacated, and case remanded, ____U.S.____ (SC No. 03-9262, Jan 24, 2005); 2005 WL 22880713; United States v. Holmes, 360 F.3d 1339 (D.C. Cir. 2004), cert granted, judgment vacated, and case remanded, ____U.S.____ (SC No. 03-10705, Jan 24, 2005); 2005 WL 125527; United States v. Haire, 371 F.3d 833 (D.C. Cir. 2004), cert granted,

judgment vacated, and case remanded, ____U.S.____ (SC No. 04-6119, Jan 24, 2005); 2005 WL 126462.

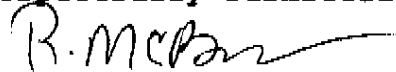
5. In the above cases, the Supreme Court applied the constitutional requirements of Blakely to the Federal Sentencing Guidelines in a retroactive manner. This point is demonstrated by the following:

6. In each case, the defendant was not pending on direct-appeal. When their cases were pending on direct-review, neither defendant raised any issue relating to the sentence or Federal Sentencing Guideline. Further, in each of the cases, the defendant mounted a Blakely attack under Booker while pending "discretionary review" in the Supreme Court. Under these circumstances, the Supreme Court still granted certiorari, vacated judgment, and remanded these cases in light of Booker.

7. Therefore, respondent's assertion that Blakely is probably not applicable to cases on collateral review is contrary to the actions taken by the Supreme Court in each of the above referenced cases.

WHEREFORE, petitioner respectfully requests this Court to DENY respondent's motion for summary judgment and will order a response to the merits of the petition for writ of habeas corpus. In the alternative, petitioner requests this Court to deny respondent's motion and grant the writ of habeas corpus.

Respectfully Submitted,



Richard A. McBrayer

Inmate No: 235965

Macomb Correctional Facility

34625 26 Mile Road

New Haven, MI 48048

In Pro Per

Dated: March 24, 2005

CERTIFICATE OF SERVICE

I, RICHARD A. MCBRAYER, hereby certifies that on this 25th day of March 2005, he mailed a copy of Petitioner's Supplemental Authority and Argument upon Respondent's attorney: BRENDA E. TURNER (P24705), ASSISTANT ATTORNEY GENERAL OF MICHIGAN, CRIMINAL APPELLATE DIVISION, P.O. BOX 30217, LANSING, MI 48909.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "R. McBrayer", with a horizontal line extending to the right.

Richard A. McBrayer
In Pro Per Petitioner

Dated: March 25, 2005.